and other courts. This brief will not revisit those specific distinctions and inconsistencies, as they have been comprehensively addressed by Petitioners. To the extent necessary, Petitioner's argument that there are inconsistencies between the Ninth Circuit's opinion and other courts, those arguments are to be deemed as thoughtfully adopted as though set forth herein.

To have inconsistent interpretations and applications of the LHWCA may present significant problems in the administration of claims and payments of benefits under relevant insurance policies. The Ninth Circuit's decision results in different insurable losses depending upon the region in the country where a particular disability claim is made. If the Ninth Circuit's decision is left intact, the concept of uniformity in the law will be subverted.

The lack of uniformity in the law can impact insurers and their policyholders in numerous ways. First, inconsistent court decisions involving the LHWCA will cause insurers to experience greater difficulty in achieving consistency in claims handling. Second, insurers will likely have greater difficulty in setting claims reserves because of the uncertainty and inconsistency in the application of the LHWCA.

Any inconsistency in the law in this area can present a significant challenge to insurers. To protect their policyholders and to ensure that they have sufficient reserves to pay potential claims, insurers must be able to accurately assess the true potential risk they may face if claims are made against their policies. This process also leads to the determination of premiums that will be charged to policyholders for coverage.

The Ninth Circuit's erroneous decision can result in varying applications of the LHWCA disability provisions from one jurisdiction to the next, the result of which would be that the level of disability payments required under the LHWCA would vary between jurisdictions. Such a volatile and inconsistent environment in the courts would leave insurers with uncertainty in their setting of loss reserves. The result of this uncertainty may be that insurers would be have to charge higher premiums to policyholders in order to have sufficient funds in loss reserves.

In addition to the reasons set forth in the Petition, each of which PCI and its member companies respectfully submit are independent grounds for granting the Petition, the Petition should also be granted to afford the PCI and other *amici curiae* the opportunity to provide this Court with a more detailed explanation of how far-reaching the implications of the Ninth Circuit's decision will likely be. The decision below may impact countless other industries, such as insurers, their employees and policyholders, and the extent to which these industries may be impacted was not addressed in the Ninth Circuit's decision. The PCI respectfully submits that this Court has the opportunity to prevent unintended negative consequences the Ninth Circuit's erroneous decision may have on others in addition to the Petitioners by granting the Petition. Accordingly, PCI respectfully submits that the Petition should be granted.

CONCLUSION

The Ninth Circuit's erroneous application and interpretation of the LHWCA warrants this Court's immediate review. The Ninth Circuit's decision below is not supported by the plain language of the Act nor by Congress' intent.

For the reasons set forth above, the Court should grant General Construction Company and Liberty Northwest Insurance Corp.'s Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD A. HODYL, JR.
Counsel of Record
MECKLER, BULGER & TILSON
123 North Wacker Drive,
Suite 1800
Chicago, Illinois 60606
(312) 474-7968

ROBERT HURNS
Director and Counsel
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 River Road
Des Plaines, Illinois 60018
(847) 297-7800

No. 05-371

In The
Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350

RAYMOND H. WARNS, JR.
Counsel of Record
ROBERT J. BURKE, JR.
HOLMES WEDDLE & BARCOTT
999 Third Ave., Suite 2600
Seattle, WA 98104
(206) 292-8008

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTORY AND LEGISLATIVE MATERIAL

TABLE OF AUTHORITIES – Continued

REPLY BRIEF

The Ninth Circuit in this case decided two critical issues of federal statutory interpretation under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50. Respondents seek to deny the extent to which these rulings conflict with the decisions of this Court and other courts of appeals and to minimize the importance of the questions presented, but they can do this only by mischaracterizing the issues before the Court and ignoring the real-world impact of the decision. As the extensive *amicus* participation helps demonstrate, the case raises important issues that this Court should decide.

I. This Court should review the Ninth Circuit's "bright-line 75% rule" requiring the application of LHWCA § 10(a) in cases in which LHWCA § 10(c) should properly apply

Section 10(a) of the LHWCA, 33 U.S.C. § 910(a) (Pet. App. 96), applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury." Respondent Castro correctly notes that "virtually no one actually works 52 full weeks in a year." Castro Br. 14. Thus petitioners could not object if an administrative law judge (ALJ) applied section 10(a), for example, when a claimant worked every day except for paid vacation time and public holidays. But it is also true that virtually no one gets 13 full weeks per year of vacation and holiday time, which is what the Ninth Circuit's "bright-line 75% rule" fails to recognize.

Section 10(a) "can not reasonably and fairly be applied," LHWCA § 10(c), 33 U.S.C. § 910(c) (Pet. App. 96), to a worker who chooses to work only four days per week in

order to enjoy three-day weekends, or to a worker who chooses to take an extra two months of vacation each summer, or to a worker who chooses "to stay off work in order to pursue the permitting process for installation of a bulkhead at his home," Castro Br. 7. In each of these cases, the worker has made a choice to work fewer hours and receive less pay because he prefers to pursue other activities. That is the worker's choice. But it is unreasonable and unfair for the worker then to demand compensation on the assumption that his injury deprives him of the wages of a full-time worker who made very different choices. The Ninth Circuit's bright-line 75% rule, however, requires this unreasonable and unfair result. Under *Matulic v. Director, OWCP*, 154 F.3d 1052, 1058-59 (CA9 1998), an ALJ may not rely on section 10(c) based solely on the number of days worked (so long as the claimant worked at least 75% of the available days). In short, the worker's choice to work fewer days – which is precisely what makes the application of section 10(a) unreasonable and unfair – is the one factor that the ALJ may not consider.

Petitioners in this case challenge the legal rule by which the Ninth Circuit denies ALJs the power to apply the LHWCA as Congress enacted it and instead requires them to apply a bright-line 75% rule ignoring the single most relevant fact in many cases. Of course an ALJ would decide, on the facts of a particular case, that a particular claimant worked "during substantially the whole of the year immediately preceding his injury" despite taking vacations and holidays. An ALJ could even decide, on the facts of a particular case, that a particular claimant's "average annual earnings" under section 10(c) are substantially the same as they would have been under section

10(a). Results in particular cases are not the point here. The point is to recognize how the decision must be made. Congress gave the power to ALJs, who hear the evidence and can see what is unreasonable and unfair in a particular case, not to Judge Reinhardt, who invented the Ninth Circuit's bright-line 75% rule in *Matulic*.[1]

Respondents seek to distract this Court from the true question presented. Indeed the Director of the Office of Workers' Compensation Programs ("OWCP") tries to rephrase the question to focus on whether section 10(a) can be applied without "practical difficulty," OWCP Br. i, when Congress explicitly declared the standard to be whether section 10(a) can be applied "reasonably and fairly," LHWCA § 10(c). But when the focus is on the proper question, it can be seen that the Ninth Circuit was correct to acknowledge (in two separate cases) that its bright-line 75% rule conflicts with *Strand v. Hansen Seaway Service*, 614 F.2d 572 (CA7 1980), *see* Pet. 11-12, and that the *Matulic* rule is inconsistent with the approach taken in the Fourth and Fifth[2] Circuits, *id.* at 12.

---

[1] Castro makes an ingenious policy argument to support the view that determinations are better made under section 10(a) than section 10(c). Castro Br. 14-16. Such arguments are better addressed to Congress, which has the power to change the criteria for selecting among section 10's three options. In any event, the evidence does not support Castro's argument that relying on section 10(a) would reduce litigation. In the Ninth Circuit, which forces claimants into section 10(a), cases addressing this issue keep rising to the appellate level. (In addition to *Matulic* and the decision below, see *Stevedoring Services of America v. Price*, 382 F.3d 878 (CA9 2004).) But the Seventh Circuit, which has rejected the Ninth Circuit's approach, does not appear to have had any reported cases in the last quarter-century.

[2] The Director's statement, OWCP Br. 11, that "the Fifth Circuit expressly relied on" *Matulic* is misleading. *Gulf Best Electric, Inc. v.*

(Continued on following page)

Castro suggests that *Strand* can be distinguished because the Seventh Circuit was simply relying on the 1948 legislative history that "explicitly showed that § 10(c) . . . was intended to be applied to 'seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek.'" Castro Br. 18 (quoting S. REP. NO. 1315, 80th Cong., 2d Sess. 6 (1948)). But there is no legitimate distinction. Castro admits that his employment was discontinuous because he took off seven weeks between jobs to attend to personal business. Castro Br. 7. The passage on which the *Strand* court relied would therefore compel reversal here. The Director's efforts to distinguish *Strand* based on the seasonal nature of the employment, OWCP Br. 10-11, fail for the same reason. There is no rational distinction between "seasonal" employment and any other "intermittent" or "discontinuous" employment.

Castro is also wrong to suggest that this case provides a poor vehicle to resolve the problems caused by the Ninth Circuit's *Matulic* rule. *Cf.* Castro Br. 20-21. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (CA9 1999) (per curiam), does not create the general rule that Castro ascribes to it. The *Duhagon* court's reference to the failure to "show the number of days worked per week" was instead a criticism of the claimant's "failure to offer any

---

Methe, 396 F.3d 601, 606 n.1 (CA5 2004), cites *Matulic* for the proposition that some over-compensation is built into the system. But this was in the context of missing work for reasons that are consistent with full-time employment, e.g., "illness, vacation, strikes." *Id.* The Fifth Circuit did not suggest that section 10(a) should apply when a worker makes a deliberate choice to work fewer days. More significantly, the Fifth Circuit explicitly declined to adopt the "bright-line test" that is at issue here. *See id.* at 606.

evidence whatsoever regarding whether he was a five day or six day worker," *Duhagon* Respondent's CA9 Br. 29. This is clear both from the briefing in the Ninth Circuit, *see, e.g., id.* at 20, 23, 29, and from the Benefits Review Board opinion that the *Duhagon* court was reviewing, *see Duhagon v. Metropolitan Stevedore Co.*, 31 B.R.B.S. 98, 101 (1997) ("claimant could not establish that he was either a five- or six-day per week worker"). Here there is no dispute that Castro was a five-day worker. Moreover, his sworn declaration in the record indicates the total number of days that he worked, *see* Pet. App. 76-77, thus solving any problem that might have arisen if his reading of *Duhagon* had been correct.

By rejecting the Congressional scheme that gives ALJs the flexibility to decide each case on its own merits and imposing a bright-line rule when no such rule is authorized, the Ninth Circuit has substituted its judgment for Congress's. Other courts of appeals have rejected this approach. This Court should review the issue and reverse the decision below.

II. This Court should review the Ninth Circuit's rule awarding total disability benefits during a period of vocational retraining when the injured employee would otherwise be limited to recovery under the Act's schedule

The petition summarizes why the decision below conflicts with the statutory language and with *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980). The four *amicus* briefs filed in support of the petition also discuss this conflict in varying detail. The Longshore Claims Association (LCA), for example, explains

how Congress considered and rejected the legal rule that the Ninth Circuit now enforces. *See* LCA Br. 14-18.

Not surprisingly, both respondents defend the Ninth Circuit's rule. For Castro, this position simply reflects the desire to preserve his victory. For the Director, this position must be viewed in the larger context. In *PEPCO*, the OWCP argued strenuously that the statutory schedule in LHWCA § 8(c)(1)-(20), 33 U.S.C. § 908(c)(1)-(20), does not limit an injured worker's recovery. This Court rejected that view by an 8-1 vote. Undeterred, the OWCP now seeks to limit the *PEPCO* decision with which it disagrees. Despite clear indications of Congress's contrary intent, the Director endorses the Ninth Circuit's effort to evade *PEPCO* through a conclusory characterization of the facts that contradicts reality.

In any event, most of respondents' arguments on this issue simply preview their positions on the merits. If this Court grants certiorari, they will have ample opportunity to argue that the definition of "total disability" should be expanded beyond its ordinary meaning to include those who are instead partially disabled[3] but who chose to participate in vocational retraining programs. Because this interpretation would undermine *PEPCO* whenever a scheduled injury is involved, this Court should be the one to resolve the matter.

---

[3] Under the Director's theory, there appears to be no need for even a partial disability. If a worker is injured but suffers no loss of wage-earning capacity, the OWCP could nevertheless conclude that a vocational retraining program was appropriate. Under the Director's theory, the worker would then be totally disabled because the vocational retraining program, which was caused by the injury, would make it difficult for the claimant to continue working.

Castro also argues that the vocational retraining issue is not important enough to warrant this Court's attention, hinting that the OWCP does not approve many vocational retraining programs. *See* Castro Br. 23. Although published figures do not seem to be available, an inquiry to the Department of Labor revealed that the Department has sponsored approximately 4200 vocational rehabilitation cases since the decision in *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (CA5 1994), eleven years ago. On the conservative assumptions that an average program lasts ten months and that a typical claimant receives compensation at the rate of $675 per week, this represents a burden on employers and their insurers in excess of $122 million. The widespread view in the industry is that these numbers are likely to increase in the near future, particularly if this Court does not correct the Ninth Circuit's erroneous interpretation of the LHWCA. *See, e.g.*, AIG Br. 6-7.

Even stronger evidence of the importance of this case is provided by the four *amicus* briefs supporting the petition. By their very nature, few LHWCA cases can financially justify a petition for certiorari to this Court unless they involve important and recurring issues. The amount at stake in most workers' compensation cases is relatively small compared to the costs associated with a petition and a susequent merits argument, so there would be no point in filing a petition unless a significant number of future cases would be affected. Here it is not only petitioners that recognize the impact that this Court's decision would have on future cases: Representatives of other significant industry participants that would be directly affected by a decision on the merits have invested the resources to file four *amicus* briefs in support of the

petition.[4] As these *amici* have no financial interest in the present case, their decisions clearly signal the importance of these questions.

It is noteworthy that this case is important not only for the maritime industry. While the Longshore Claims Association (LCA) primarily represents the maritime industry, *see* LCA Br. 1-2, and the interests of the Longshore Institute, Inc., include the maritime industry, the other *amici* are concerned about this case because of the impact that it will have in other fields. Congress has chosen to extend the LHWCA to provide a workers' compensation regime in several other contexts. *See, e.g.*, Longshore Inst. Br. 1 & nn.2-5; Castro Br. 1 n.2. Thus the American International Group, Inc. (AIG) and CNA support the petition because the issues are important in the context of the Defense Base Act, 42 U.S.C. §§ 1651-55. Civilian employees (regardless of their nationality) who work overseas for a private employer under a contract with the United States government – including, for example, those now working in Iraq and Afghanistan – will be directly affected by this decision. *See* AIG Br. 1-3.

The Ninth Circuit has ignored the clear intent of Congress to reach a result motivated by sympathy rather than a proper application of the LHWCA. Its decision is

---

[4] Castro hints that certiorari should instead have been granted in two other cases that, in his view, raised more important issues. *See* Castro Br. 25-26. The industry's own views of what is important to it, however, differ from Castro's. In *Fred Settoon, Inc. v. Gros*, 125 S. Ct. 408 (2004) (No. 03-1699), and *Brickhouse v. Jonathan Corp.*, 525 U.S. 1040 (1998) (No. 98-241), the two cases that Castro cites, it appears that *no amicus* briefs were filed in support of the petitions. The presence of four *amicus* briefs here is a strong signal that this case is important to the industry.